IN THE

Supreme Court of the United States

October Term, 1978

No. _____

BILLY JOE WOODS,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CENTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

By: J. MICHAEL THORNELL

THORNELL & URBAN
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-1211
Counsel for Petitioner

INDEX

CITATIONS

1. Argersing vs. Hamblin, 407 U.S. 25, 92 S.Ct. 200, 32 L. Ed., 2d 530 (1972)

2. Bradford vs. U.S. (Ca 5 La) 129 F.2d 274, cert.den. 317 U.S. 683, 87 L.Ed.2d 547, 63 S.Ct. 205

3. Davis vs. Estelle, 529 F.2d 437, (Ca. 5th Cir., 1976)

4. Grieger vs. Vega, 271 S.W.2d 85 (1954)

5. Griffin vs. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965)

6. Hood vs. U.S., 59 F.2d 153 (1932 Ca 10 Okla)

7. Hopt vs. Utah, 120 U.S. 430, 30 L.Ed. 708, 7 S.Ct. 614

8. Juelich vs. U.S., 214 F.2d 950 (Ca 5 Ga)

9. Linden vs. U.S., 296 F. 104 (1924 Ca 3 NJ)

10. Livingston vs. State, 542 S.W.2d 655, cert. den., 97 S.Ct. 2642 (1976)

11. Logan vs. U.S., 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617 (1892)

12. Loper vs. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 372 (1972)

13. Malloy vs. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964)

14. Martin vs. State, 475 S.W.2d 265 (Tex.Crim.App., 1972)

15. Morford vs. U.S., 339 U.S. 258, 94 L.Ed. 815, 70 S.Ct. 586 (1949)

16. McFarlan vs. State, 266 S.W.2d 133, 134 (Tex.Crim.App, 1954)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BILLY JOE WOODS,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, BILLY JOE WOODS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals in this proceeding only July 19, 1978.

OPINION

The opinion of the Texas Court of Criminal Appeals on original submission of the cause appears in the Appendix hereof.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered and delivered on July 19, 1978, and a timely petition for rehearing was denied by order of the Texas Court of Criminal Appeals on September 20, 1978. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

Petitioner requests that this Court consider this petition, even though late, because of the manifest injustice that will result if this Court does not review same.

QUESTIONS PRESENTED

1. Whether the Trial Court acted improperly in admitting gross, inflamatory photographs of the deceased.

2. Whether the Trial Court improperly allowed the attorney for the State of Texas to advise prospective jurors that he (the attorney) cannot call the Defendant as a witness.

3. Whether the Trial Court erroneously permitted the attorney for the State of Texas to inform prospective jurors the effects of their answers to the Special Issues.

4. Whether the Trial Court erred and not sustaining the defense challenge for cause to three prospective jurors.

5. Whether the Trial Court erred in allowing a State psychiatrist to talk to the Defendant without the Defendant's attorney being present.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction of capital murder from the 177th Judicial District Court (State), Harris

County, Texas. The Defendant was found guilty, and because of affirmative answers to the two Special Issues, punishment was assessed at death. It is from that judgment and sentence of the Trial Court, based on the verdict of the jury, that Petitioner requests this petition for certiorari.

This being a capital murder case, the potential veniremem were questioned individually and a part from each other as provided by the Texas Code of Criminal Procedure. This is noted only because some of the questions presented by Petitioner are in regards to the jury selection.

The State's case in chief consisted of the following:

> Four Houston police officers testified that they had received a "burglary in process call" and went to the apartment of the deceased. That apartment was located upstairs, the officers knocked on the door with no response. The officers observed someone wearing tennis shoes walking around inside the apartment. One officer, and subsequently others, went around to the back and arrested the Petitioner on the balcony outside the deceased apartment. The officers entered the apartment, found the partially nude body of the deceased. Blood and hair samples were taken from Petitioner and a piece of deceased jewlery was found on the Petitioner.

Over the defense objection, all the physical evidence including

photographs were admitted into evidence.

During the course of the State's case in chief, the State called Mrs. Ora E. Lindley (Tr. 1282-1286), sister of the deceased, who told of various illnesses suffered previously by the deceased, and her current treatment for cancer. She identified certain pieces of physical evidence and was shown a picture of the deceased which had previously been received into evidence and at Tr. 1285, stated:

> "...I saw her in the casket at the funeral home too, and that one eye, while she was in the casket, it looked like half of a tennis ball. Oh, she was black and blue."

All of the pictures that Petitioner objects to were introduced and recorded at Tr. 1299.

REASONS FOR GRANTING THE WRIT

Point of Error No. One

The Offer of the Photographs of the Deceased and their Subsequent Admission over the Objection of the Defense, in the Instant Case Constitutes Sufficient Error that a New Trial should be Ordered for Petitioner.

Prior to any discussion of this Court's decisions and those of the State of Texas, Petitioner assures this Court that he is not asking this Court to enunciate any new principles of law with respect to the admissability of photographs. Petitioner would show that the photographs admitted and shown to the trial

jury were done so for no legitimate purpose under our system of criminal jurisprudence. Petitioner can only speculate that the pictures were offered for the purpose of inflaming and prejudicing the jury (Tr. 1299-1300). The photographs appear at Tr. 1407-1411. By any standard, the photographs of the very elderly, sick deceased woman are sickening. There is cancer protruding from a tumor behind of of the eyeballs, etc. Petitioner's counsel will not presume to interpret the affect on the jury or this Court's interpretation of same. However, Petitioner respectfully submits that there is no disputed fact issue which these photographs might even tend to remotely resolve. It is Petitioner's request that this Court carefully review the photographs and determine whether or not the learned trial judge abused his discretion in admitting the photographs in this case alone.

The State of Texas has vacillated somewhat over the years in outlining tests to be used by Trial Courts in admitting photographs. An interesting and dramatic discussion occurred in McFarlan vs. State, 266 S.W.2d 133, 134 (Tex.Crim.App., 1954) wherein the Court distinguished between the introduction of photographic evidence of the body of a deceased in an homocide case and an assault case:

> "A distinction is apparent. There are no degrees of death, and therefore the pictures would not be helpful to the jury in properly assessing the punishment. Quite the contrary is true in an assault case."

There seems to be a recent trend, to this author, to use

a test which allows admission of the objects only when their probative value outweighs the tendency to prejudice the minds of the jurors. See, e.g., People vs. Cheary, 309 P.2d 431 (1957) (pictures held admissible; test mentioned); Poe vs. Commonwealth, 301 S.W.2d 900 (Ky, 1957); 40 Texas Law Review 284-287.

Again, Petitioner will not belabor what the law is or should be. The test in Texas apparently is that cited in Martin vs. State, 475 S.W.2d 265 (Tex.Crim.App., 1972) at page 267, wherein the Court announces that photographs may be admissible if a verbal description of the body and the scene would be admissible. Petitioner believes that the verbal description of the deceased,given by the State's witnesses, was not (at least to the extent given) helpful to the jury in resolving any disputed fact issue.

Point of Error No. Two

The Trial Court improperly allowed Attorneys for the State to tell Prospective Jurors that the State cannot call the Defendant as a Witness.

The bulk of the record that is before this Court (approximately three/fourths) are the notes of the jury selection process which took place before Trial Judge Stanley Kirk, (currently removed from office and under indictment for improper matters regarding another jury.) Petitioner will not burden the readers

of this brief with a listing of each instance with each venireman wherein the prosecuting attorney told each juror that the rules of procedure were such that he (the prosecutor) could not call the Defendant to take the witness stand. Petitioner asserts that this tactic is tantamount to an improper argument commenting on the Defendant's failure to take the stand. That is to say, the State's attorney is trying to do prior to his case in chief, that which he cannot do after presentation of same, at least by way of argument. This is patently unfair and infringes upon the Petitioner's Fifth and Fourteenth Amendment rights.

The Fifth Amendment privilege against self incrimination applies to the States through the Fourteenth Amendment, Malloy vs. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964).

Under the Fifth Amendment, the Defendant's failure to testify cannot raise a presumption of guilt. See, e.g., Bradford vs. U.S. (Ca 5 La) 129 F.2d 274, cert. den. 317 U.S. 683, 87 L.Ed.2d 547, 63 S.Ct. 205.

Not only is it unconstitutional for refusal to testify to raise an inference of guilt, it is also unconstitutional for either the prosecutor or the judge to comment or give instructions to the jury that such silence is evidence of guilt. Griffin vs. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965).

It is not necessary that the comments complained of by Petitioner be made directly and in final argument,it is traditionally done and commented upon by prosecutors to be prejudicial. Clever prosecutors, as in the instant case, may make these in-

direct comments, prior to a jury even being sworn, and fall into this category. Petitioner would invite this Court's attention to Linden vs. U.S., 296 F. 104 (1924 Ca 3 NJ) and Hood vs. U.S., 59 F.2d 153 (1932 Ca 10 Okla.).

Point of Error No. Three

The Trial Court erroneously committed the State's Attorney to inform Prospective Jurors of the Effects of their Answers to Special Issues.

The Assistant District Attorney repeatedly advised the prospective jurors that affirmative answers to the Special Issues would result automatically in the death penalty.

The Code of Criminal Procedure of the State of Texas is silent, with respect to this procedure, albeit the Texas Court of Criminal Appeals has previously held this to be a correct procedure, 556, S.W.2d 309.

As a general rule, in the practice of criminal law in the State of Texas, wherever the Code of Criminal Procedure is silent as to a procedural matter, the Courts are directed to look at the Rules of Civil Procedure. Rule 277 of the Texas Rules of Civil Procedure prohibits the explanation to a jury of the effect of their answer to Speciall Issues. In fact, it has been held to be erred in civil procedures, to inform a jury of the effect of their answers on the theory that the effect of their answer should not be relevant to a conscientious juror

who is trying to resolve a fact issue on the basis of the evidence presented alone, without the interference passion, prejudice, etc. Such a civil case holding same is Grieger vs. Vega, 271 S.W.2d 85 (1954).

These civil rules are obviously designed so that a jury will not, because of sympathy alone, award a Plaintiff a great sum of money even thouqh the Defendant might not, in fact, be legally liable. Thus, the question that this Court must decide is whether or not a human life is any less significant than the award of monies from an insurance company.

Point of Error No. Four

Whether the Trial Court erred in Overruling the Defense Challenges for Cause of Three Prospective Jurors.

The first juror complained of is Ms. BILLY IVY. The defense objection is restated at Tr. 1111-1112, and the objection went to the fact that Ms. IVY held the belief that if a person was convicted of capital murder, they would commit it again. Juror IVY was number 25 and her testimony appears at Tr. 369-395. This appears to be almost the reverse of the Witherspoon situation. At this point in the trial (jury selection), Juror IVY certainly had no evidence upon which to sentence a man to leath.

The second juror complained of by Petitioner is Juror LIVINGSTON (Tr. 539-565), who testified that there would be a question in his mind about the defense presenting no

evidence, and he stated he could not put this out of his mind. The defense challenges for cause were made at Tr. 561 and Tr. 1112 (close reading of the transcript reveals that the defense attorney at the trial level inadvertently called this juror by the wrong name, i.e., WILLIAMSON).

The third juror, JONES, whose testimony appears at Tr. 606-627, states that "I would require the Defendant to testify," and that he would want or expect a rebuttal of the State's evidence. Your Petitioner presented his challenge for cause at Tr. 1112-1113 and Tr. 627, and the Trial Court overruled same. The defense was forced to use a peremptory challenge again.

This Court has long held the existence of a state of mind of a juror which will prevent him from acting with impartiality as a ground for a challenge for cause. See Logan vs. U.S., 144 U.S. 263, 36 Lawyers Edition 429, 12 S.Ct. 617 (1892), and Morford vs. U.S., 339 U.S. 258, 94 Lawyers Edition 815, 70 S.Ct. 586 (1949).

Any juror who has formed an opinion on the merits of a given case and who cannot disregard that opinion and render a verdict only on the evidence produced, should be disqualified for cause. This Court enunciated the test in Hopt vs. Utah, 120 U.S. 430, 30 Lawyers Edition, 708, 7 S.Ct. 614. See also Juelich vs. U.S., 214 F.2d 950 (Ca. 5 Ga); Parsons vs. State, 271 S.W.2d 643, cert den, 348 U.S. 837, 99 Lawyers Edition 660,

75 S.Ct. 36.

The existence of an actual basis as a state of mind on the part of a prospective juror which will prevent him or her from acting within entire impartiality and without prejudice to the substantial and substantive rights of the Defendant constitutes a ground for a challenge for cause. See Morford vs. U.S., supra.

It is Petitioner's belief that a careful reading of the Court Reporter's notes of the testimony of the three prospective jurors will convince this Court that a challenge for cause should have been sustained with respect to each, and in the absence thereof, a new trial should be granted.

Point of Error No. Five

Whether or not the Trial Court Erroneously allowed a State's Psychiatrist to Examine the Petitioner Without the Benefit of having an Attorney Present.

The punishment trial of the Petitioner commenced at Tr. 1350. JOSE G. GARCIA, M.D., a psychiatrist, was called by the State of Texas (Tr. 1363-1371), who testified in response to a hypothetical question posed by the Assistant District Attorney (Tr. 1365-1366), that a person under the hypothetical question as presented would, in fact, constitute a continuing threat to society and would commit future acts of violence. The defense objected to the hypothetical question and the same was overruled at Tr. 1364.

Literally as this brief is being dictated, the American Psychiatric Association is passing and will subsequently issue, guidelines that no psychiatrist can or should ethically answer that type of question.

Petitioner is aware that there are a number of cases holding explicitly that a Defendant is not entitled to have his attorney present at psychiatric examinations. See for example Livingston vs. State, 542 S.W.2d 655, cert den, 97 S.Ct. 2642 (1976); U.S. vs. Smith, 436 F.2d 787 cert den, 91 S.Ct. 1680, 402 U.S. 976, 29 Lawyers Edition 142. However, there are numerous cases from this Court which have held that a criminal Defendant is entitled to counsel at any stage at a criminal proceeding where his substantial rights are involved. See Argersing vs. Hamblin, 407 U.S. 25, 92 S.Ct. 200,32 Lawyers Edition, 2d 530 (1972); Loper vs. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 Lawyers Edition 2d 372 (1972); U.S. vs. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 Lawyers Edition 2d 1149.

The right to counsel has been extended to all critical stages of criminal proceedings-- critical stage being defined where substantial rights of the Defendant are involved. See Davis vs. Estelle, 529 F.2d 437, (Ca.5th Cir., 1976). This Court in other cases has held that the Defendant is entitled to counsel and identification (lineup). Petitioner would argue that a psychiatric examination is a "critical state of the criminal proceeding" as much or more than a lineup. Probably such an examination could

and would more likely result in substantial prejudice to the Defendant in that the psychiatrist is a learned, trained individual usually dealing with an inadapt, unlearned Defendant.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

THORNELL & URBAN

Original Signed By
MICHAEL THORNELL

BY: J. MICHAEL THORNELL
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-1211

COUNSEL FOR PETITIONER

DATED: 7-6-79

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of July, 1979, three copies of the petition for writ of certiorari were mailed, postage prepaid to the Honorable Mark White, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Original Signed By
MICHAEL THORNELL

J. MICHAEL THORNELL

COUNSEL FOR PETITIONER

BILLY JOE WOODS, Appellant

NO. 58,774 Vs. Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. After a verdict was returned finding appellant guilty of capital murder, the jury returned affirmative answers to the questions required by Article 37.071(b)(1), (2), V.A.C.C.P., mandating a penalty of death which was imposed by the court.

The sufficiency of the evidence is not challenged; however, the State's evidence shows that in the middle of the night appellant climbed up some poles and lattice work to the balcony of the second story apartment of a 63 year old woman who was afflicted with cancer and could move about only with the aid of a walker. Appellant forced the door open from the balcony into the apartment and once inside robbed the occupant and beat and strangled her to death. He also apparently attempted to perform some sort of sexual act with her because she was found to be nude from the waist down, several hairs from her head were found jammed in the zipper of appellant's fly which was open when he was arrested at the scene, and a considerable amount of feces and blood from the deceased were found on the front of appellant's trousers, shorts, shirt and shoes.

The defense offered no evidence at the trial either on guilt/innocence or punishment.

We will first consider appellant's contention that error was committed when someone other than the judge assigned to try the case heard and ruled on appellant's motion for a new trial.

The record reflects that the Honorable Stanley C. Kirk, Judge of the 78th District Court of Wichita County, was

administratively assigned to the 177th District Court of Harris County prior to the trial in this case. Judge Kirk presided during the hearing on appellant's pretrial motions, the voir dire of prospective jurors, the guilt/innocence stage of the proceedings and the hearing on punishment. Subsequently, appellant filed a motion for a new trial and the record reflects that the Honorable Larry Gist presided at that hearing. Appellant raised no objections to Judge Gist presiding at the hearing and presented no evidence on his motion for new trial.

This court will judicially notice that the Honorable Larry Gist is the duly elected Judge of the Criminal District Court of Jefferson County and, in the absence of an objection made to his presiding at the hearing on the motion for a new trial, all objections to his authority to sit are considered waived and it is presumed that he was in the regular discharge of his duties pursuant to Article 1916, V.A.C.S., authorizing District Judges to exchange benches or hold court for each other. Peach v. State, 498 S.W.2d 192 (Tex.Cr.App. 1973); Floyd v. State, 488 S.W.2d 830 (Tex.Cr.App. 1972). Further, it is not improper for different judges to sit at different hearings in a case, and this holds true, absent an abuse of discretion, even if an objection is made. Hogan v. State, 529 S.W.2d 515 (Tex.Cr.App. 1975); Balderas v. State, 497 S.W.2d 298 (Tex.Cr.App. 1973); Joines v. State, 482 S.W.2d 205 (Tex.Cr.App. 1972); Lavallas v. State, 444 S.W.2d 931 (Tex.Cr.App. 1969). No error is shown.

Appellant next alleges that the trial court erred in overruling his objections to the hypothetical question posed to the psychiatrist who testified for the State during the hearing on punishment. His first complaint, that the hypothetical question was based on evidence not introduced in the punishment phase of trial but rather in the guilt/innocence phase of the trial, is clearly without merit because this court held in Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977), that evidence elicited at the guilt stage as well as the penalty stage of the trial may be considered.

Appellant also complains that two phrases in the hypothetical question are not supported by the testimony. The phrases are ". . . kicked in a lady's door forcibly . . ." and ". . . and was then caught in the room with her . . ."

In Atkinson v. State, 511 S.W.2d 293 (Tex.Cr.App. 1974), this court stated:

> "A hypothetical question must be based upon the facts of the case. Robertson v. State, 463 S.W.2d 18 (Tex.Cr.App. 1971). . .
>
> "The applicable rule has been stated as follows:
>
> > "'Counsel propounding the question is entitled to the witness' opinion upon any combination of facts inferable from the proof. He may and usually does assume facts in accordance with his theory of the case. If the opponent desires to secure the expert's opinion upon a different set of facts he may do so on cross-examination.' McCormick & Ray, Evidence, § 1403, at p. 240 (2d ed. 1956)."

The evidence showed that the balcony door to deceased's apartment was opened with considerable force having been exerted near the bottom of the door and appellant had abrasions and bruises on his knees. Appellant was not arrested in the room with the deceased woman, but he was observed in the tiny apartment containing her body before he was arrested as he exited the apartment onto the balcony. Under these circumstances, we find no error in the hypothetical question.

In his third ground of error, appellant complains that the State introduced certain exhibits by stipulation when in fact appellant did not so stipulate. Appellant's brief contains neither argument nor citation of authority in support of his position and, after a review of the portion of the record referred to in the brief, we find no error. The exhibits complained of contain the record of appellant's conviction for attempted aggravated rape in Louisiana in 1970. These documents were properly admissible under Article 3731a, V.A.C.S., as business records, and appellant and his trial counsel stipulated that certain portions of the documents, relating to appellant's parole violation in Louisiana

and a summary of the facts of the attempted aggravated rape offense, could be removed from the exhibits before allowing the jury to have the documents.

This ground of error is overruled.

Appellant next complains that the trial court forced disqualification of a juror by improperly commenting on the weight of the evidence and the facts of the case. The record reflects that prospective juror Sandifer was questioned on voir dire outside the presence of other jurors and prospective jurors and was apparently having some difficulty in understanding the various degrees of murder as provided in the laws of this State. The trial court made the complained of comment, after an extended colloquy with Sandifer, as follows:

> "THE COURT: You see, sir, we have certain degrees of murder in Texas. And we have certain cases where a crime has not been committed negligently, there is no negligence, but there is intent. And a crime is committed intentionally where a person intentionally kills someone.
>
> "But, when a person does not intentionally do an act which then results in the death of someone, that would be negligent homicide. That would not apply to this case, I do not think." (Emphasis added.)

No objection was made to this comment and thus nothing is presented for review. Hovila v. State, 562 S.W.2d 243 (Tex.Cr. App. 1978); Jenkins v. State, 488 S.W.2d 130 (Tex.Cr.App. 1972); Minor v. State, 469 S.W.2d 579 (Tex.Cr.App. 1971).

Further, any error in the comment was rendered harmless when appellant, without ever mentioning the court's comment, successfully challenged the prospective juror for cause after the prospective juror evinced his strong leanings toward the death penalty whenever a defendant is found guilty of capital murder.

In his fifth ground of error, appellant argues that the court erred in allowing the State to tell prospective jurors that the defendant's prior criminal record could be introduced at the punishment phase of the trial. Appellant alleges that most veniremen were told by the assistant district attorney

that during the punishment phase new evidence could be presented that was not presented at the guilt/innocence phase and specifically that each juror was told that "the defendant's," or "a defendant's," prior criminal record could be introduced and considered for punishment purposes, or as an aid in answering the special issues submitted to them. He indicated four specific instances in which this occurred.

While we perceive that it would be error for a prosecuting attorney to tell prospective jurors that the defendant in the case to be tried had a prior criminal record, it is of course a correct statement of the law that after a finding of guilty, evidence may be admitted as to the prior criminal record of a defendant. Article 37.07, V.A.C.C.P. We have carefully examined each of the four instances indicated by appellant in his brief, and in fact have carefully considered the entire voir dire examination of all prospective jurors, and do not find support for appellant's ground of error.

All prospective jurors were examined on voir dire outside of the presence of the other jurors and prospective jurors, and in the first instance cited by appellant the State in examining prospective juror Lawson, who was later peremptorily excused by the defense, commented:

> "And I might say this, in answering these questions you would be able to consider evidence that you had heard from the first part of the trial as well as new evidence that you would be entitled to hear from the second part of the trial, such as in the second part of the trial a defendant's prior character, prior convictions, if any, things to help the jury to decide how to answer these questions would be admissible in the punishment part of the trial which may or may not be admissible in the first part of the trial. So you have all this evidence to base your answer on."

The second instance cited by appellant contains no comment by anyone relating to a prior criminal record.

The third instance cited by appellant occurred during the examination of prospective juror Smith, later peremptorily excused by the defense, when the State commented:

> ". . . Now, in the punishment part of the trial there could be more evidence presented, such as a defendant's character in the community or any prior criminal history or records, if he had any, this type thing to help the jury decide the answer to the two questions."

In the fourth instance cited by appellant in his brief, the State in examining prospective juror Costello, who became a juror in the case, commented:

> "In addition, at the punishment stage new evidence will be presented, such as defendant's prior criminal records, if he had any, things such as this. Now, it would be the state's burden to prove to you beyond a reasonable doubt that the answer to these two questions should be yes and if the state did not prove to you, you would have to answer no. Could you do that?"

These quoted comments are typical of the comments directed to most of the prospective jurors and because they do not inform the prospective jurors that this defendant did in fact have a prior criminal record, we find no error.

It should also be noted that we find only two instances in which appellant objected to these sorts of comments. The first time occurred after twenty prospective jurors had been examined (and after the first three "instances" cited by appellant in his brief had gone by without objection). The court sustained the objection as to the use of the word "the" in the phrase "the defendant's prior criminal record, if any," and advised the State to use the word "a" instead of "the." The second time occurred after twenty-six more prospective jurors had been examined and no ruling was obtained on the objection.

This ground of error is overruled.

Appellant next lists seven "Points of Consideration" in his brief which he urges this court to consider "in determining if appellant recieved (sic) a fair trial and was accorded due process of law as contemplated by the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and their counterparts in the Texas State Constitution."

These "Points of Consideration" are without citation of authorities or argument, are not in compliance with Article 40.09, § 9, V.A.C.C.P., and therefore present nothing for review. Hicks v. State, 545 S.W.2d 805 (Tex.Cr.App. 1977); Byrom v. State, 528 S.W.2d 224 (Tex.Cr.App. 1975); Henriksen v. State, 500 S.W.2d 491 (Tex.Cr.App. 1973); McCary v. State, 477 S.W.2d 624 (Tex.Cr.App. 1972).

The judgment is affirmed.

ONION, Presiding Judge

(Delivered July 19, 1978)
En banc